85-748

Case No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1985

George A. Keller,

Petitioner,

v.

The United States,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

Petition for Writ of Certiorari

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I. Questions Presented.

A. After a party has successfully litigated averments of jurisdictional fact, in order to obtain a transfer from one court to another, do principles of repose and finality preclude that party from later assailing the factual basis for the exercise of the jurisdiction of its chosen court.

B. Conflict between the Fifth and Federal Circuits on the question whether a public employee, after involuntary separation, forfeits his rights of administrative appeal and judicial review of that separation by accepting vested pension rights based on involuntary separation.

C. Do Fifth Amendment due process considerations allow presumption of waiver of rights to appeal and review of

involuntary separation from government service, where the record is silent and the employee was uninformed.

D. Do Fifth Amendment due process principles of fair play and substantial justice support the reasonable expectation of adherence to statute, regulation and precedent.

II. Parties to Proceedings Below.

In addition to the named Respondent, the following may have an interest in the outcome of this action, or were parties to earlier proceedings:

A. Merit Systems Protection Board

B. National Aeronautics and Space Administration

C. Marshall Space Flight Center

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V. Opinions Delivered Below.

This is an action for review of an administrative appeal arising out of the June 30, 1972 involuntary separation of Petitioner George A. Keller (Keller) from the service of the National Aeronautics and Space Administration (NASA) at Marshall Space Flight Center (MSFC) in Huntsville, Alabama, by reduction-in-force (RIF). In the thirteen years of this litigation, there have been numerous opinions entered, both administrative and judicial. Without some of the long case history, reference to these opinion out of context would be more confusing than illuminating.

Keller appealed his RIF to the Atlanta Regional Office of the Civil Service Commission (CSC) on July 14, 1972, raising five issues, including his

veteran's preference rights and his qualifications for the position to which he had declined to be reassigned (Appendix to Petition (hereinafter Pet. App.) pg. 169). Keller's appeal was summarily denied, with certain issues declared immaterial, on September 19, 1972 (Pet. App. pg. 164). Keller then appealed to the CSC's Board of Appeals and Review (BAR) on October 10, 1972. On March 8, 1973, the BAR summarily affirmed (Pet. App. pg. 160).

Keller then filed this action pro se in the United States District Court for the Northern District of Alabama, styled George A. Keller v. Robert E. Hampton, et al., Docket No. 75-G-0846-NE. On June 22, 1976, finding failure to respond to Keller's contentions, misconstruction and misapplication of law, arbitrary action and violation of Keller's rights of due

process, the District Court remanded to the CSC with instructions to respond fully to Keller's contentions (Pet. App. pg. 134). The CSC remanded to the Atlanta Field Office on August 5, 1976.

The Field Office affirmed the RIF action, without addressing the issue of whether Keller met the special qualifications for the reassignment, on May 12, 1977 (Pet. App. pg. 114). On May 27, 1977, Keller appealed to the ARB. The ARB issued an opinion on October 27. 1978 affirming in part and remanding to the Field Office for reconsideration of the issue of Keller's qualifications (Pet. App. pg. 104). On January 8, 1979, the Field Office affirmed the RIF (Pet. App. pg. 95).

Keller appealed to the Merit Systems Protection Board (MSPB) Office of Appeals. The District Court granted Keller's

motion to compel action by the MSPB, and on October 24, 1979, ordered the MSPB to enter a "final, reviewable decision" and to respond to all issues raised by Keller (Pet. App. pg. 93). On December 10, 1979 the MSPB rendered its final decision, which affirmed the RIF on the "sole issue" that Keller was qualified for reassignment to the position offered in the RIF (Pet. App. pg. 83).

Keller then moved in the District Court to review the MSPB decision. On April 29, 1980, the District Court issued its Memorandum Opinion in favor of Keller, finding the Board had failed to comply with due process, that its decision was arbitrary, capricious and unsupported by substantial evidence, and that the Board had blatantly ignored two Orders from the District Court. The

Court rendered its decision reinstating Keller with back pay.

On motion to reconsider by the defendant, that opinion was withdrawn and a second Memorandum Opinion was entered on June 26, 1981, which reached the same result on the merits, holding, inter alia, that Keller was not reasonably qualified for the position to which he had declined to be reassigned. George A. Keller v. Robert E. Hampton, et al., (N.D. Ala., Docket No. CA-75-G-0846-NE, June 26, 1981) (Pet. App. pg. 56).

On August 24, 1981, the government appealed to the Eleventh Circuit. It suggested that jurisdiction lay in the United States Court of Claims, because the award of back pay due Keller after 10 years had been calculated to exceed the sum of $10,000. On June 21, 1982, the Eleventh Circuit found that the facts

established jurisdiction in the Court of Claims, and ordered this action transferred. Keller v. Merit Systems Protection Board, 679 F.2d 220 (11th Cir. 1982) (Pet. App. pg. 44).

Keller resubmitted his original pro se Complaint before the Claims Court on October 20, 1982. On August 8, 1983, the United States served its Motion for Summary Judgment and brief. Keller filed a Cross-Motion for Summary Judgment and brief on September 16, 1983. On October 31, 1983, the United States filed its reply brief asserting for the first time that Keller had separated voluntarily by retirement, and that his acceptance of retirement benefits avoided the Court's jurisdiction.

Oral argument on the parties' Motions for Summary Judgment was heard before the Claims Court on September 5,

1984. The court on August 17, 1984 ordered Keller to address the issue of his retirement, in light of specific cases, in his argument (Pet. App. pg. 35). At the conclusion of the argument, the Court overruled plaintiff's Motion for Summary Judgment and entered judgment in favor of the United States on its Motion, dismissing plaintiff's Complaint, expressly without reaching or considering the merits of plaintiff's arguments. The decision, announced from the bench, held that the argument was jurisdictional, and that the United States was free to question the jurisdiction of the Court at any time. The Court concluded that Keller separated by RIF, but that he surrendered his right to appeal and review of his separation by accepting his vested annuity benefits (Pet. App. pg. 6).

Keller appealed from that decision to the United States Court of Appeals for the Federal Circuit, which issued an unpublished opinion on June 18, 1985, affirming the decision of the Claims Court. The Federal Circuit held that Keller's retirement precluded him from seeking reinstatement and back pay. Keller v. United States, affirmed, 770 F.2d 182 (Fed. Cir. 1985) (Pet. App. pg. 1). Keller petitioned for rehearing and suggested rehearing in banc, which were denied and declined without opinion by Order dated August 1, 1985 (Pet. App. pg. 168).

VI. Jurisdictional Statement.

The jurisdiction of this Court is invoked to review the decision of the United States Court of Appeals for the

Federal Circuit, entered June 18, 1985, with no time indicated; Petition for Rehearing and Suggestion of Rehearing In Banc were denied and declined on August 1, 1985; this Petition for Writ of Certiorari is brought under 28 U.S.C. Section 1254(1), within ninety (90) days of the entry of the Order denying rehearing, as provided under 28 U.S.C. Section 2101(c).

VII. Constitutional Provisions, Statutes and Regulations Involved.

This matter involves consideration of the following constitutional provisions, statutes and regulations. Those not recited herein are set forth in the Appendix:

U. S. CONST., amend. V.

5 U.S.C. §701 et seq..

5 U.S.C. §5596.

5 U.S.C. §7512 (1972 ed.).

5 U.S.C. §7701 (1972 ed.).

5 U.S.C. §7703.

5 U.S.C. §8336 (1972 ed.).

5 U.S.C. §8344(d):

(d) If a member receiving annuity from the Fund becomes employed in an appointive or elective position, annuity payments are discontinued during the employment and resumed in the same amount on termination of the employment, except that--

(1) the retired Member or Member separated with title to immediate or deferred annuity, who serves at any time after separation as a Member in an appointive position in which he is subject to this subchapter, is entitled, if he so elects, to have his Member annuity computed or recomputed as if the service had been performed before his separation as a Member and the annuity as so computed or recomputed is effective--

(A) the day Member annuity commences; or

(B) the day after the date of separation from the appointive position;

whichever is later;

(2) if the retired Member becomes employed after December 31, 1958, in an appointive position on an intermittent-service basis--

(A) his annuity continues during the employment and is not increased as a result of service performed during that employment;

(B) retirement deductions may not be withheld from his pay;

(C) an amount equal to the annuity allocable to the period of actual employment shall be deducted from his pay, except for lump-sum leave payment purposes under section 5551 of this title; and

(D) the amounts so deducted shall be deposited in the Treasury of the United States to the credit of the Fund;

(3) if the retired Member becomes employed after December 31, 1958, in an appointive position without pay on a full-time or substantially full-time basis, his annuity continues during the employment and is not increased as a result of service performed during the employment; and

(4) if the retired Member takes office as Member and gives notice as provided by section 8331(2) of this title, his service as Member during that period shall be credited in determining his right to and the amount of later annuity.

5 U.S.C. §8345(b):

(b) Except as otherwise provided, the annuity of an employee or Member commences on the day after he is separated from the service, or on the day after his pay ceases and he meets the service and the age or disability requirements for title to annuity. An annuity payable from the Fund allowed after September 5, 1960, commences on the

day after the occurrence of the event on which payment thereof is based.

5 U.S.C. §8345(d):

(d) An individual entitled to annuity from the Fund may decline to accept all or any part of the annuity by a waiver signed and filed with the Civil Service Commission. The waiver may be revoked in writing at any time. Payment of the annuity waived may not be made for the period during which the waiver was in effect.

28 U.S.C. §1491.

5 C.F.R. §550.805(e)(2):

(e) In computing the amount of back pay under section 5596 of title 5, United States Code, and this subpart, an agency shall deduct--

* * *

(2) Any erroneous payments received from the Government as a result of the unjustified or unwarranted personnel action, which, in the case of erroneous payments received from a Federal employee retirement system, shall be returned to the appropriate system. The agency shall include as other employment only employment engaged in by the employee to take the place of employment from which the employee has been separated by the unjustified or unwarranted personnel action.

VIII. Statement of the Case.

This case is a claim against the United States under 28 U.S.C. §1491, for judicial review under 5 U.S.C. §§701 et seq., 3502, 7512 (1972 ed.), 7701 (1972 ed.) and 7703, seeking reinstatement and benefits under the Back Pay Act, 5 U.S.C. §5596. Keller, a veteran's preference eligible, was employed by NASA at MSFC in Position 10448-S, and assigned effective September 17, 1968 to the Astronautics Laboratory. Keller was reassigned on Time Limited Assignment (TLA), to the Space Station Task Team April 14, 1969, approved January 22, 1970, and his position was revised to Position 11939.

Keller was returned to the Astronautics Laboratory on September 1, 1971, but his TLA was not terminated and he remained in Position 11939. Keller was advised that there was no room for

another position at his grade level, and that the Laboratory was faced with reductions-in-force. On May 15, 1972, Keller received a RIF notice, abolishing Position 11939, and offering reassignment effective June 30, 1972 to Position 11938 in lieu of separation, which he was given three days to accept or decline. If he declined or failed to reply, he would be separated by RIF effective June 29, 1972. MSFC advised Keller that reassignment could be accepted and subsequently declined. Keller accepted the reassignment on May 18, 1972, despite his concerns that his general engineering background left him unqualified for such a position, which involved specialized aerodynamic design and testing.

On June 27, 1972, at 3:50 p.m., Keller found on his desk a letter titled

"Assignment," dated June 26, 1972, from the Laboratory Director, Karl Heimberg. Independent of the formal position description, and effective June 30, 1972, Heimberg assigned Keller to work independently and report for a first review within two months on a highly technical project long underway without Keller's involvement, and to familiarize himself with a field of advanced astrophysics in which his predecessor had been regarded as a leader.

In light of Heimberg's letter, Keller concluded that he had accepted a job for which he was not qualified. Operating under a June 29, 1972 RIF deadline, Keller had two days to decline; as of June 30, 1972 he would be in Position 11938, and under Heimberg's assignments. Inadequate qualifications would risk Keller's separation for cause,

for inability to perform; from that his only recourse would be voluntary resignation.

Keller was 49 years of age, with 31 years of govenment service. If involuntarily separated by the planned RIF, Keller would be vested with an immediate discontinued service annuity, under 5 U.S.C. §8336(d) (1972 ed.). But if separated voluntarily (by resignation) or for cause, his annuity would not vest until age 55. The aerospace industry was then an especially poor job market for individuals over the age of 45. The immediate annuity offered the only certain prospect of financial support for Keller and his family.

On June 28, 1972, Keller orally advised MSFC that he would decline the reassignment. Later that day, he was advised that the June 29, 1972 deadline

for the RIF had been suspended by a temporary restraining order in a class action in the District of Columbia, and that he could not be separated prior to clarification of the order. On Friday, June 30, 1972, Keller received a copy of a letter which clarified the temporary restraining order.

Keller conferred with the agency to decline the reassignment, executed a form they provided as a prerequisite to the declination and separation, and was separated by RIF that day. Keller was never advised that his discontinued service annuity would affect his right to appeal the RIF. He submitted an application for his vested annuity on Monday, July 3, 1972. On June 14, 1972, Keller filed his appeal of his separation.

On administrative appeal, no question of jurisdiction was raised, nor any issue made of Keller's annuity. Therefore no findings of fact were made on these matters. Keller's assertion of involuntary separation was not responded to through six levels of administrative appeal, his first Complaint for judicial review in the District Court, on appeal to the Eleventh Circuit, nor even on resubmission of Keller's original Complaint in the Claims Court.

After counsel amended to restate Keller's original pro se Complaint in the Claims Court, the United States asserted lack of information to admit or deny his allegation of involuntary separation, which had been twice admitted in previous answers. Issue was not clearly made by the United States until its reply brief on summary judgment. The Claims Court's

decision was based on that belated averment. The Federal Circuit's affirmance predicates this Petition.

Certain key facts were overlooked by the Claims Court and the Federal Circuit. These facts distinguish Keller. First, Keller was a veteran's preference eligible. Second, he was separated from service by reduction-in-force (RIF) on June 30, 1972. He did not separate by retirement. Keller applied for his vested discontinued service annuity under 5 U.S.C. §8336(d) (1972 ed.), on July 3, 1972. Third, Keller's annuity--which the government approved--required prior involuntary separation, 5 U.S.C. §8336(d) (1972 ed.), and is distinct from "optional" or voluntary retirement, 5 U.S.C. §8336, (to which Keller was not entitled because of his age). There is no evidence to the contrary.

IX. Argument.

This matter presents for the Court's consideration a classic example of abuse of process through overextension of the theorem that subject matter jurisdiction can be questioned at any time. Here, that question was misapplied to deny Keller access to justice twelve years after the fact. The courts below allowed the government to reopen examination of the facts on which jurisdiction was based, despite repeated admissions of the jurisdictional facts, and one decision by a federal court of appeals on those facts. Certiorari in this matter should be granted to more clearly distinguish the divergent principles, that subject matter jurisdiction may remain open as a question of law, but that finality should

be given to admitted or litigated jurisdictional facts.

After admitting Keller's allegations of jurisdiction based on involuntary separation, during both administrative appeal and judicial review, the United States lost on the merits of the case in the District Court. Only then, ten years after Keller's separation, did the United States assert that the amount of Keller's claim exceeded $10,000, a jurisdictional fact which the government advanced and litigated on appeal to the Eleventh Circuit. Having admitted and even litigated jurisdictional facts, and having successfully argued in favor of the Claims Court's jurisdiction, Keller v. Merit Systems Protection Board, supra, the United States advanced an attack on the Claims Court's jurisdiction in its reply brief on summary judgment.

This second assault on the court's jurisdiction to hear Keller's case was predicated on new, factual averments: that Keller had either voluntarily separated or waived his right to appeal his separation. The Claims Court's decision to entertain and then adopt this argument, affirmed by the Federal Circuit, conflicts with decisions in this Court and other circuits holding that parties should be bound to jurisdictional facts, once either admitted or litigated. Pittsburg, C. & St. L. Ry. v. Ramsey, 89 U.S. (22 Wall.) 322 (1875); United States v. Riles, 70 F.2d 880 (8th Cir. 1934); United States v. Ellison, 74 F.2d 846 (4th Cir. 1935); Vincent v. United States, 76 F.2d 428 (D.C. Cir. 1935); United States v. Wilson, 78 F.2d 465 (10th Cir. 1935); Murphy v. Sun Oil Co., 86 F.2d 895 (5th Cir. 1936), certiorari

denied, 300 U.S. 683 (1937); Young v. Handwork, 179 F.2d 70 (7th Cir. 1949), certiorari denied, 339 U.S. 949 (1950); N.L.R.B. v. Townsend, 185 F.2d 378 (9th Cir. 1950).

To give finality to determinations of such facts is a rule of fairness, applied to prevent litigants from taking inconsistent positions regarding the factual basis for jurisdiction, Roth v. McAllister Brothers, Inc., 316 F.2d 143 (2d Cir. 1963), or from a tardy challenge to the jurisdiction of a forum it has chosen. City of Brady, Texas v. Finklea, 400 F.2d 352 (5th Cir. 1968). The United States has once prevailed on appeal on its argument that the facts herein gave the Claims Court jurisdiction over this matter. Keller v. Merit Systems Protection Board, supra. For the United States to raise factual questions to

invalidate that jurisdiction now cannot be tolerated: "a defendant may not play fast and loose with the judicial machinery and deceive the courts." DiFrischia v. New York Central Railroad Co., 279 F.2d 141, 144 (3d Cir. 1960).

Perhaps the Claims Court and Federal Circuit were simply too overzealous in their adherence to the generally accepted principle that subject matter jurisdiction can always be questioned. They failed to discern that the alleged absence of jurisdiction did not appear "affirmatively from the record." Cf., Mansfield, C & L.M. Ry. v. Swan, 111 U.S. 379, 386 (1884). The attack on jurisdiction hinged on questions of fact which had once been litigated and were foreclosed, by the law of the case, cf., Skillern v. May, 10 U.S. (6 Cranch) 267 (1810), if not collateral estoppel or res

judicata. Cf., Chicot County Drainage Dis. v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed.2d 329 (1940); Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963).

Moreover, the Merit Systems Protection Board's decision to consider Keller's appeal, and not dismiss it for lack of jurisdiction, should have been given weight. Federal Power Commission v. Louisiana Power & Light Co., 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972). The administrative tribunal's implicit determination of the facts giving it jurisdiction over Keller's administrative appeal should have been binding on judicial review. Manning v. Merit Systems Protection Board, 742 F.2d 1424 (Fed. Cir. 1984).

Certainly, if these were issues of fact not previously decided by the MSPB,

the United States should have been barred by the doctrine of res judicata and collateral estoppel from raising new issues on judicial review. Spears v. Merit Systems Protection Board, 766 F.2d 520 (Fed. Cir. 1985). Judicial review should be confined to the administrative record. Roberts v. Morton, 549 F.2d 158 (10th Cir. 1976), certiorari denied, 434 U.S. 834, 98 S.Ct. 121, 54 L.Ed.2d 95.

Because it is generally considered to remain "open season" on subject matter jurisdiction, some enlightened guidance from this Court, as by Writ of Certiorari here, is needed. Blind exercise of jurisdictional scrutiny, especially in cases of severe prejudice to one litigant, ought to be mitigated. See, Dobbs, Beyond Bootstrap, 51 MINN. L.REV. 491 (1967); 18 Wright & Miller, FEDERAL PRACTICE & PROCEDURE §4428.

The prejudice to Keller, facing a novel averment of twelve-year old facts, is unmistakable. He had been in litigation for years; witnesses had died in the interim. At the very least, the United States has overreached this individual citizen, if it has not exploited the judicial system and wasted its resources. Intervention in this case can clarify the distinction between the principles of determining subject matter jurisdiction and seeking prompt and final adjudication of the facts. Certiorari here may serve both to conserve judicial economies and to advance the notion of fair play and substantial justice.

The United States' novel assertion had to be couched as a jurisdictional argument. Arguably, twelve years' delay may be excused on matters of subject matter jurisdiction. Estoppel could

clearly bar an averment phrased otherwise. Cf., Russell Corp. v. United States, 537 F.2d 474, 210 Ct. Cl. 596 (1976), certiorari denied 429 U.S. 1073, 97 S.Ct. 811, 50 L.Ed.2d 791 [against denial of fact of contract]; Bolton v. Giuffrida, 569 F.Supp. 30 (N.D. Cal. 1983) [where detrimental reliance and threat of serious injustice].

The Claims Court allowed the United States' argument to be raised so late on the assumption it was jurisdictional. Yet the decision to dismiss on that defense does not turn on subject matter jurisdiction at all. The Claims Court found that Keller's separation occurred before he took his annuity, but concluded that Keller, by "applying for and accepting retirement, voluntarily surrendered all claims to his former position." (Pet. App. pg. 32.)

Once Keller was separated by the RIF, jurisdiction vested. He had suffered an adverse action, which violated his veteran's preference rights. By virtue of the RIF action, Keller was entitled by statute to administrative appeal and judicial review. 5 U.S.C. §§701 et seq., 3502, 7512 (1972 ed.), 7701 (1972 ed.) and 7703. He could be made whole, under the Back Pay Act. 5 U.S.C. §5596. Nothing in the statutes indicates that jurisdiction, once vested, can be divested.

Keller took his annuity after separation by RIF; under the same facts, jurisdiction has been found to lie with the MSPB. Kestner v. United States, 229 Ct. Cl. 772, 774 (1982); Gonzales v. Dept. of Transportation, 701 F.2d 36, 39 (5th Cir. 1983). The subsequent annuity should not divest him of his rights, nor

the courts of their jurisdiction to review the administrative appeal of such adverse action. Dean Forwarding Co., Inc. v. United States, 2 Cl. Ct. 559 (1983). Jurisdiction to review Keller's appeal in court was established by the exercise of jurisdic ion by the MSPB to hear the appeal in the first instance. Manning v. Merit Systems Protection Board, supra.

Supreme Court intervention is sought in this action to resolve a conflict between the decisions of the Federal Circuit and those of the Fifth Circuit. The Federal Circuit has held that one who accepted involuntary separation, then took a discontinued service retirement annuity, as did Keller, has "voluntarily surrendered" his right to appeal. The Fifth Circuit has stated that such an employee would not lose his right to

appeal. Gonzales v. Dept. of Transportation, supra. The conflicting result would allow separated federal employees to be treated in opposite fashion, depending on whose claim exceeded the sum of $10,000 and had to be pursued in the Federal Circuit. Surely such a monetary distinction presents no rational basis for disparate treatment under the law.

Furthermore, the result embraced by the Federal Circuit, and eschewed by the Fifth Circuit, effects an absolute travesty of justice. Having lost his employment, Keller was at his peril to provide for his family. The Federal Circuit would deny Keller the support of the annuity accumulated during his 31 years of service, while he pursued this appeal, which has now been pending for over 13 years. The government would

always prevail in such a simple war of attrition, regardless of the merits. The Federal Circuit would see the wrongfully discharged public employee forced out of court because economic necessity forced him to rely upon a vested property right. The same defense has been rejected by the Fifth Circuit in private employment cases. Cf., Hays v. Republic Steel Corp., 12 F.E.P. Cases 1640 (N.D. Ala. 1974), 531 F.2d 1307, 12 F.E.P. Cases 1654 (5th Cir. 1976). Such an irrational conflict in results suggests the need for the Court's intervention.

The gravity of the lower courts' mistakes far exceeds mere error or conflict between circuits. More importantly, the court's decision here presumed a waiver of rights accorded Fifth Amendment due process protection, in the face of case law long established

by this Court. The practical effect of the Claims Court's decision and the Federal Circuit's affirmance is that Keller could not enjoy both his appeal and review and his annuity, that by taking his annuity Keller surrendered his right of action. This unfairly places the federal employee in a dilemma, repugnant to the principles of due process which protect tenured federal employees, Colm v. Vance, 567 F.2d 1125 (D.C. Cir. 1977).

Concomitant with his job, Keller had a property interest in his employment. Kizas v. Webster, 707 F.2d 524, 227 U.S. App. D.C. 327 (D.C. Cir. 1983), certiorari denied, 104 S.Ct. 709. He enjoyed additional, constitutionally protected rights as a veteran's preference eligible. Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972).

On the other hand, Keller's annuity was a vested property right, as well. By statute, his annuity commenced automatically on the day after his separation, under 5 U.S.C. §8345(b), regardless of his application.

The courts below concluded that Keller waived his right of appeal and review when he accepted his annuity. But to have declined that annuity, unbeknownst to Keller, the law would have required him to file a written waiver with the CSC, now the Office of Personnel Management. 5 U.S.C. §8345(d).

The lower courts indicate that Keller waived his veteran's preference rights to appeal and review of his separation. Yet in what appears to be binding precedent, the Claims Court has rejected that notion. There could be no waiver, as no provision for such a waiver

of rights was found in the Veteran's Preference Act. Cunningham v. United States, 423 F.2d 1379 (Ct. Cl. 1970).

In no way does the evidence in the record support the courts' conclusion of a waiver by Keller's failure to decline his annuity. For there to be a waiver, "it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege," which demands an examination of the facts allegedly supporting the waiver. Brookhart v. Janis, 384 U.S. 1, 4, 86 S.Ct. 1245, 1247, 16 L.Ed. 2d 314 (1966). To pass constitutional muster, waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742,

748, 90 S.Ct. 1463, 1469, 25 L.Ed. 2d 747 (1970).

There was no advice given Keller regarding the effect of taking his vested annuity or suggesting the need to file a written waiver of his annuity rights to preserve his appeal rights. It can only be concluded that the courts presumed a waiver of Keller's rights from a silent record, which is a denial of due process. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969).

There is even a presumption against finding waiver: "we are unwilling to find waiver in circumstances which fall short of being clear and compelling." Curtis Publishing Company v. Butts, 388 U.S. 130, 145, 87 S.Ct. 1975, 1986 (1967). It is this high concept of due process that makes the Orders below so especially

odious to call for intervention by this Court on Writ of Certiorari.

Action by this Court, furthermore, is the only method for correction of these courts' gross departure from accepted judicial standards. These decisions trammel upon not only the Constitution, but also statutes, Congressional intent, and pertinent regulations. Because they are unreported, and conflict with reported decisions, their use as precedent denies even the most diligent litigant the reasonable expectation of stare decisis. These unreported decisions, until reversed by this Court, may otherwise be invoked against any federal claimant. They must be overturned to avoid judicial chaos.

The conclusion that Keller's annuity adversely affected his administrative and

judicial remedies is unsupported. By statute, his annuity would end on reinstatement, 5 U.S.C. §8344. The intent of Congress to aid, not penalize, people in Keller's situation was clearly stated:

> * * * to provide that when an annuitant whose prior separation was based on involuntary causes (reduction-in-force, etc.) was reemployed, he surrendered his retirement status and became a regular contributing member of the retirement program just as if he had never been retired. It is felt that this benefited the involuntarily separated employee whose career had been interrupted through no fault of his own.

S. Rep. No. 1069, 89th Cong., 2d Session, reprinted in 1966 U.S. Code Cong. & Ad. News 2090, 2091. At least since 1956, Congress has intended that annuitants not be barred from reemployment. Federal Executive Pay Act of 1956, Ch. 804--Public Law 854, 84th Cong.--2d

Session, reprinted in 1956 U.S. Code Cong. & Ad. News 858, 883 and 3725, 3736.

Nothing in the Back Pay Act, 5 U.S.C. §5596, says that its remedies are exclusive of the right to an annuity. As Congress has stated, the purpose of the Act is to make whole, not work a forfeiture:

> It puts the employee in the same position he would have been and had the unjustified or erroneous personnel action not taken place * * * an employee is entitled to be made whole whenever an erroneous personnel action which has terminated . . . his compensation is corrected by appropriate authority (emphasis added).

S. Rep. No. 1062, 89th Cong., 1st Session, reprinted in 1966 U.S. Code Cong. & Ad. News 2097.

Moreover, the regulations promulgated for the agency administration of the Act provide that annuity payments are simply to be offset against the back

pay award. 5 C.F.R. §550.805(e)(2). It is only a prerequisite to a Back Pay Act claim that the employee be willing and able to perform. Walker v. United States, 179 Ct. Cl. 723 (1967), certiorari denied, 389 U.S. 1036, 88 S.Ct. 772, 19 L.Ed. 2d 825. Keller remains ready, willing and able to perform a job properly offered, for which his qualifications are reasonably adequate.

The Federal Circuit affirmed the decision of the Claims Court, that Keller surrendered his cause of action by taking his annuity, in an unreported opinion (Pet. App. pg. 1), based on its prior unreported decision (Pet. App. pg. 41) affirming Brown v. United States, 2 Cl. Ct. Rep. 586 (1983), affirmed, 732 F.2d 167 (Fed. Cir. 1984). While Brown can be factually distinguished and was

erroneously applied, such unreported decisions lay a trap for the litigant who relies on stare decisis effect of conflicting, reported decisions on the same issues.

The courts below did not respond to Keller's argument that he was too inadequately counselled to be deemed to have waived his rights. While focusing on questions of actual deception, the lower courts' decisions avoided consideration of the requirements in the law that reasonable advice be given to the employee. For example, in Taylor v. United States, 591 F.2d 688 (Ct. Cl. 1979), regulations were recognized as providing that an action is voluntary only if the employee "has freedom of choice" and "understands the transaction," Id. at 691.

Yet these guidelines were ignored in the lower courts, in spite of the total absence of advice given Keller on the effect of his retirement, as shown by the record on appeal. Keller could not have understood the transaction at issue; not understanding, he had no freedom of choice. By prior, reported case law, neither distinguished nor overturned, Keller's actions would therefore not qualify as "voluntary."

The Federal Circuit's affirmance of the Claims Court's "voluntary surrender" holding is especially anomalous in light of precedent. Keller did not need to prove intent to deceive, but only that a reasonable person under the circumstances would have been misled. Scharf v. Dept. of the Air Force, 710 F.2d 1572 (Fed. Cir. 1982).

The record reflects no advice to Keller that accepting his annuity would preclude any right to a later appeal and review of his separation. The same failure to advise had been deemed a denial of the right to consider such fact in making the decision to accept the annuity. Covington v. Dept. of Health & Human Services, 750 F.2d 937, 943 (Fed. Cir. 1984). Keller's decision, "based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process." Id.

The Federal Circuit has publicly rejected such a choice as Keller's as "a Hobson's choice, that is to say no real choice at all," Id.. Yet it proceeds to dismiss employees' actions, in unreported decisions such as Keller's and Brown v. United States, supra, for lack of

affirmative evidence that the employee was "misled as to the effect retirement would have on his rights." Keller v. United States, at 2 (Fed. Cir. App. No. 85-729, June 18, 1985) (Pet. App. pg. 3).

This disparate result on the same facts is exactly the sort of departure from the accepted principles of stare decisis and the usual course of judicial proceedings that requires this Court's intervention. Rule 17.1(a), Supreme Court Rules. The role of law in our society is to govern our conduct. Without the Court's guidance here, that certain conduct which is subject to the jurisdiction of the Claims Court and the Federal Circuit will have lost some of the law's governance. Litigants will apparently be unable to rely on reported case precedent in these courts.

The failure of the courts below to adhere to their own precedents even extends to the scope of inquiry given Keller's case. It had repeatedly been held in recent, similar cases that to fully and fairly determine voluntariness in this context, the court must consider the merits of the case. Burgess v. Merit Systems Protection Board, 758 F.2d 641 (Fed. Cir. 1985); Hearne v. United States, 7 Ct. Cl. 362 (1985); Covington v. Dept. Health & Human Services, supra. The reason for such holdings was obvious: if, but for the wrongdoing of the agency, the employee would not have been in this dilemma, would not have had to choose between alternative actions, then his choice must be involuntary and not binding. Roskos v. United States, 549 F.2d 1386 (Ct. Cl. 1977). Yet in determining that Keller had "voluntarily

surrendered" his right of action, the Claims Court specifically stated that it did not consider the merits of his case. (Pet. App. pg. 33). The affirmance of that decision by the Federal Circuit after the rulings in Roskos v. United States, Burgess v. Merit Systems Protection Board, Hearne v. United States, and Covington v. Dept. Health & Human Services, supra, is so abusive of Keller's reasonable expectations of substantial justice and due process as to cry out for the issuance of this Court's Writ.

Although they went so far as to consider facts outside the record and once-litigated facts, the Claims Court and Federal Circuit failed to discern the facts that distinguish this case. Keller was clearly separated by RIF. His subsequent "discontinued service

retirement" annuity was officially approved by the agency, under 5 U.S.C. §8336(d) (1972 ed.). The statute expressly conditions entitlement to the annuity on involuntary separation. Keller's age, 49 years, disqualified him for receipt of "optional" retirement on voluntary separation. 5 U.S.C. §8336.

The approval of Keller's annuity represents an official determination that he was involuntarily separated, a determination entitled to the presumption of regularity which clothes official acts. Wilmot v. United States, 205 Ct. Cl. 666 (1974). Keller was entitled to rely on the presumption of regularity, yet the courts below held that Keller failed to prove his separation was involuntary. Not one case was cited to hold that Keller's §8336(d) annuity would be presumed to be voluntary. The government

should have had the burden of disproving the correctness of the agency determination. Due process argues that, under these facts, it was impermissable to place on Keller the burden of proving the correctness of the official determination given his separation.

Furthermore, to find this a voluntary separation is to deprive the statutory language of its express meaning. To achieve that goal, the statute must be bent, and its words strained against the intent of Congress, which must be avoided. Ocean Drilling & Exploration Co. v. United States, 600 F.2d 1343 (Ct. Cl. 1979). The absurdity of this construction of the statute, and the equally absurd result, must be disdained. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982).

The government never denied Keller's eligibility for his discontinued service retirement annuity. There is no basis for its inconsistent assertion that Keller was not separated by RIF, or that his "retirement" was anything but involuntary. On identical facts, the Federal Circuit has held the employee's retirement involuntary. Covington v. Dept. Health & Human Services, supra at 942. The failure of the court to adhere to its own precedent, without any distinction drawn, brings disarray to our judicial system. Order can be restored by the issuance of the Court's Writ.

Keller has been overreached by the government's factual sleight-of-hand, assisted by the lower courts' departure from reasonable standards of jurisprudence. If the District Court's opinion is any indication, Keller should

prevail on the merits of his challenge to the separation from service. Like any other litigant, Keller had the right to a prompt, full and fair determination of his case on its merits. Without this Court's assistance, that will have been denied him. With the Court's guidance, it will be less likely to be denied others in the future.

Respectfully submitted,

James H. Richardson
Counsel of Record for
Petitioner

X. Appendix.

Due to the voluminous nature of the materials appended to this Petition, Petitioner separately presents his appendix.

XI. Certificate of Service and Filing.

I, James H. Richardson of Huntsville, Alabama, a member of the Bar of this Court, do hereby certify, under penalty of perjury, that on this 30th day of October, 1985, I caused to be placed in the United States Mail (first-class postage prepaid) Petitioner's "PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT" and "PETITIONER'S APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT" as follows:

A. Three copies of both documents were addressed to each of the following:

1. Solicitor General
   United States Department
   of Justice
   Washington, D.C. 20530

2. Kathleen A. Flynn, Attorney
   Commercial Litigation Branch

Civil Division
Department of Justice
Washington, D.C. 20530

B. Forty copies of both documents were addressed as follows, for filing within the permitted time under Rule 28, Supreme Court Rules:

1. Honorable Joseph Spaniol, Clerk
The Supreme Court of the
United States
1 First Street, N.E.
Washington, D.C. 20543

James H. Richardson

James H. Richardson

STATE OF ALABAMA

COUNTY OF MADISON

The foregoing Certificate of Service and Filing was sworn to and subscribed before me this 30th day of October, 1985.

Susan M. Campbell
Notary Public
My commission expires:
9-20-87